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No. 90-710

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of California

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner believes that its petition adequately meets the opposition of respondent-real parties in interest except for the ensuing discussion of two authorities of respondent-real parties' in interest authorities.[1]

[1] The parties have not changed from those listed in the petition. The identity of parents and subsidiaries of petitioner have not changed from those listed in the petition.

ARGUMENT

1. Respondent-real parties' in interest citation of *Cantrell v. Great Republic Insurance Co.* 873 F.2d 1249 (9th Cir. 1989) is inapposite.

Cantrell involved an action to collect ERISA benefits under 29 U.S.C. § 1132(a)(1)(b) but artfully pleaded as a state law claim. *Id.* p. 1252. State courts have concurrent jurisdiction of actions under § 1132(a)(1)(b) 29 U.S. Code § 1132(e)(1). The case does not, therefore, stand for the proposition that failure timely to remove vests the state court with jurisdiction of the subject matter of an action otherwise within the exclusive jurisdiction of the United States District Court. *Cantrell* is applicable, however, in its discussion of artful pleading, *Id.* p. 1252-1253, showing that the present action is really a claim under the Miller Act, 40 U.S.C. § 270.

2. Respondent-real parties' in interest citation of *Hunter v. United Van Lines* 746 F.2d 635 (9th Cir. 1984) is inapposite.

In *Hunter* the court held that where plaintiff had a Carmack Amendment claim in an amount smaller than the $10,000.00 jurisdictional limit provided by 28 U.S.C. § 1337, he could not lump that claim and allegedly pendent state law claims to obtain jurisdiction. *Id.* p. 649-642. Petitioner contends that all the claims are based on the Miller Act and subject to exclusive federal jurisdiction; *Hunter,* therefore, is not in point. The court in *Hunter* did indicate that the artful pleading doctrine applies and federal jurisdiction is applicable when federal law not only displaces state law, but also confers a federal remedy. *Id.* p. 642. This court has held that the Miller Act provides a federal cause of action and **the scope of the remedy as well as the substance of the rights** created thereby are matters of federal not state law. *F. D. Rich Co. v. United States for the Use of Industrial Lumber Company* 417 U.S. 116, 127, 40 L.Ed.2d 703, 94 S.Ct. 2157 (1974). Accordingly, the artful pleading doctrine apples, *Hunter v. United Van Lines* 746 F.2d 6735, 642 (9th Cir. 1984), or respondent-real parties in interest have alleged an outright federal claim arising in substance under the Miller Act. Cf. *Ingersoll-Rand Co. v. McClendon* ___ U.S. ___, ___ L.Ed.2d,

S.Ct. ___ (1990 U.S. Lexis 6121, decided December 3, 1990), holding that a state law claim for discharge to avoid paying ERISA benefits arises in substance under ERISA and that the state courts lack jurisdiction. Particularly compelling is the reasoning of the following paragraph of the case:

> McClendon argues that the pension plan is irrelevant to the Texas cause of action because all that is at issue is the employer's improper motive to avoid its pension obligations. The argument misses the point, which is that under the Texas court's analysis there simply is no cause of action if there is no plan. *Id.* pp. 14, 15.

In the present case, if there is no Miller Act bond, there is no cause of action, and the case hence arises under the Miller Act.

CONCLUSION

This court should grant certiorari and order the superior court to dismiss the case for lack of subject matter jurisdiction.

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Respectfully submitted,

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